

ARTICLES

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Regulating Davy Jones: The Existing and Developing Law Governing the Interaction with and Potential Recovery of Human Remains at Underwater Cultural Heritage Sites

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In 1798, the British Royal Navy sloop HMS *De Braak* sank in a storm in the Delaware River.¹ Thirty-four of the *De Braak*'s crew perished with the ship.² In 1984, more than a century and a half later, Sub-Sal, a commercial treasure salvaging company, rediscovered the vessel.³ Preserved within the confines of the wooden vessel were an unknown number of human remains belonging to the crew of the *De Braak*.⁴

Armed with neither a professional scientific nor archeological approach to research and recovery, and concerned mostly with recovering gold and other valuables from the wreck, Sub-Sal proceeded to "salvage" the wreck site of the *De Braak*.⁵ These salvage efforts consisted of raising the hull of the *De Braak* with cables and dredging the sea floor surrounding the wreck site.⁶ During this process, Sub-Sal disturbed and then discarded human remains belonging to the crew of the *De Braak*.⁷ This careless and disrespectful treatment resulted in the loss of the remains forever.⁸

Since 1984, the discovery of human remains on shipwrecks and at other underwater cultural heritage (UCH) sites has become increasingly prevalent as technological advances make UCH sites more accessible.⁹ Likewise, both domestic and international law is increasingly recognizing the need to regulate the interaction with and potential recovery of human remains from UCH sites. This paper will

¹ Peter Bilton, *Archeology: Commercial Salvage and the Shipwreck of HMS De Braak*, KNOJI (July 23, 2012), <http://history.knoji.com/archaeology-commercial-salvage-and-the-shipwreck-of-hms-de-braak/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ ANGUS KONSTAM, *THE HISTORY OF SHIPWRECKS* 156–57 (The Lyons Press 2002).

⁶ *Id.*

⁷ *See id.*

⁸ *See id.*

⁹ *See, e.g., Ship Lost for More than 150 Years is Recovered*, ASSOCIATED PRESS (July 28, 2010, 9:24 PM), <http://www.mnn.com/earth-matters/wilderness-resources/stories/ship-lost-for-more-than-150-years-recovered-in-Canada>. The efficiency of modern shipwreck-finding techniques is quite incredible. For example, the HMS Investigator, which had been lost for 157 years, was recently found in a mere fifteen minutes by a team of Canadian archeologists. *Id.* Oil and natural resource exploration companies have also been instrumental in the discovery of lost shipwrecks. For example, using advanced exploration techniques and technologies, oil companies in the Gulf of Mexico have recently discovered two nineteenth century wooden shipwrecks, and the wreck of a German U-Boat from World War II, among other wrecks. *See* Cain Burdeau, *Sinking Oil Threatens Historic Gulf Shipwrecks*, ASSOCIATED PRESS (July 4, 2010), http://www.boston.com/news/nation/articles/2010/07/04/sinking_oil_threatens_historic_gulf_shipwrecks/.

discuss the existing and developing law on the topic of human remains discovered in underwater wrecks of vessels, aircraft, and spacecraft (shipwrecks) and at other UCH sites.

I

PRELIMINARY FACTUAL QUESTIONS CONCERNING THE INTERACTION WITH AND RECOVERY OF HUMAN REMAINS AT SEA

A. The Likelihood of Encountering Human Remains During Exploration and Excavation of Underwater Cultural Heritage

Despite assumptions otherwise, human remains have been discovered in more than a dozen shipwrecks, including the HMS *Victory*, the HMS *Investigator*, the HMS *De Braak*, the USS *Monitor*, the HL *Hunley*, the HMS *Bedfordshire*, the *La Belle*, and others. Human remains have even been found in shipwrecks dating to the late Roman Empire. Perhaps the most famous collection of human remains was found aboard the British warship *Mary Rose*, where archeologists found more than ninety skeletons.¹⁰ Most recently, controversy has mounted over the possibility of encountering human remains in such famous shipwrecks as the USS *Arizona* and the RMS *Titanic*.¹¹ In addition to shipwrecks, partly submerged cities such as Port Royal, Jamaica, and Alexandria, Egypt, as well as ancient burial grounds, such as the Native American burial ground beneath Nantucket Sound, provide additional opportunities for encountering human remains at sea.¹² The increasing number of encounters with human remains at sea, and the unresolved issues surrounding these encounters, prompted the research and presentation of this paper.

B. Distinguishing Human Remains from Other Underwater Cultural Heritage

Human remains often present unique opportunities to study and learn about those who have come before us. At the same time, such remains must be distinguished from other archeological or cultural

¹⁰ *Mary Rose skeletons studied by Swansea sports scientists*, BBC NEWS (Mar. 16, 2012), <http://www.bbc.co.uk/news/uk-wales-17309665>.

¹¹ See, e.g., *Guidelines for Research, Exploration and Salvage of RMS Titanic*, 66 Fed. Reg. 18, 905, 18, 912 (Apr. 12, 2001).

¹² See Tom Moroney & Jim Efstathiou, *Obama Wind Farm Goals Threatened by Indian Rites, Kennedy's Parting Wish*, BLOOMBERG NEWS (Apr. 14, 2010, 9:00 PM), <http://www.bloomberg.com/news/2010-04-15/obama-wind-farm-goals-threatened-by-indian-rites-kennedy-s-parting-wish.html>.

resources. Unlike a cannon, a utensil, or other tangible good recovered from a UCH site, human remains have an emotional and personal component. Relatives or descendants of the deceased may be sensitive to the loss and offended by improper treatment of the remains. Military fallen, including those who perished in shipwrecks and aircraft crashes at the whim of the seas, deserve our utmost honor and respect for their sacrifice.¹³ Even those civilian sailors who perished with no family deserve respect for the trade and traditions in which they took part, and as a way to recognize the grim fate they suffered at sea. For these reasons, human remains deserve treatment distinguished from that given to other UCH resources.

C. Shipwrecks as Gravesites

Many, if not most, shipwrecks are gravesites of some fashion. This is because, in a large majority of cases, sailors on board the vessel perished during the wreck. The question then arises whether all shipwrecks, regardless of whether human biological remains are discovered at the wreck site, should be classified as gravesites and thus treated reverently with a degree of respect similar or equal to those sites where human remains are actually encountered. If so, should only the wreck site itself, sitting on the ocean floor, be considered a gravesite, or should the surface water also be considered as part of the gravesite? Should the excavation at shipwreck sites differ from the excavation of gravesites at underwater cities such as Port Royal, Jamaica?

D. Unresolved Questions Concerning the Interaction with and Potential Recovery of Human Remains at Sea

There are many difficult questions that may arise when interacting with human remains at sea. For example, what constitutes a human remain? Does a boot suffice? When it is clear that an individual wore the boot at the time of the wreck? Though the flesh and bone have long since disintegrated? Should a wedding ring or an article of clothing still worn by the deceased upon discovery be included as a human remain? Or should only biological human remains—flesh and bone—be considered? Another pressing question is whether UCH sites known or believed to contain human remains should be disturbed at all? Should the United States National Park Service tamper with the

¹³ See generally MICHAEL SLEDGE, *SOLIDER DEAD: HOW WE RECOVER, IDENTIFY, BURY & HONOR OUR MILITARY FALLEN* (2005).

wreck of the USS *Arizona* to plug an oil leak?¹⁴ Should surviving members of a sunken vessel be allowed to disturb the site in order for their own remains to be interred with their deceased shipmates? If one family wishes to recover the remains of a loved one from a UCH site, and another family wishes to keep the site undisturbed, how are these contrasting wishes to be balanced?¹⁵ Additionally, should divers be allowed to take pictures of human remains encountered at wreck sites? If such photographs are taken, should there be restrictions about publishing or broadcasting the images? Should divers be allowed to dive or explore wreck sites that contain human remains at all? These and many other questions surround the interaction with and potential recovery of human remains at sea. While there are perhaps no clear answers to these questions at present, this paper attempts to highlight legal precedent that may assist in providing guidance when faced with these or similar human remains issues at UCH sites.

II

DEVELOPMENT OF THE CURRENT INTERNATIONAL SCHEME

A. Developing the Maritime Jurisdictional Framework

In response to growing debate over how to manage the resources of the continental shelf and high seas, fueled in part by proclamations issued by the United States exerting jurisdiction and control over areas previously considered high seas, state representatives gathered in 1958 at the first United Nations Conference on the Law of the Sea (UNCLOS I) to set forth a regime of maritime jurisdictions to govern the open seas.¹⁶ Four conventions emerged from the Conference: (1) Convention on the Territorial Sea and the Contiguous Zone, (2) Convention on the Continental Shelf, (3) Convention on Fishing and Conservation of Living Resources of the High Seas, and (4) Convention on the High Seas.

The 1982 Conference on the Law of the Sea (UNCLOS III) adopted provisions reinforcing, redefining, and expanding upon the 1958 Convention. The principles encompassed within the 1982 Law of the Sea Convention are now widely considered customary

¹⁴ See SUBMERGED CULTURAL RES. UNIT, NAT'L PARK SERV., SUBMERGED CULTURAL RESOURCES STUDY: USS ARIZONA MEMORIAL AND PEARL HARBOR NATIONAL HISTORIC LANDMARK (Daniel J. Lenihan ed., 2d ed. 1990).

¹⁵ See Abandoned Shipwreck Act Guidelines, 55 Fed.Reg. 50,116-01, 50,131 (Dec. 4, 1990) (giving surviving family members a say in the disposition of the deceased).

¹⁶ See LOUIS B. SOHN ET AL., LAW OF THE SEA IN A NUTSHELL 2-3 (2d ed. 2010).

international law, and thus establish the framework within which the preservation of international underwater cultural resources must be understood.¹⁷

1. Internal Waters

Both the 1958 Convention on the Territorial Sea and the Contiguous Zone and the 1982 Law of the Sea Convention recognized that “[w]aters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.”¹⁸ A state has full sovereignty in its internal waters.¹⁹ The right of innocent passage also does not apply in internal waters.²⁰

2. Territorial Sea

The 1958 Convention on the Territorial Sea and the Contiguous Zone recognized that a coastal state has full sovereign rights over “a belt of sea adjacent to its coast” called the territorial sea.²¹ Although the Convention provided guidance on the procedure for delineating a coastal state’s territorial sea, it did not set parameters governing the distance to which the territorial sea could extend. However, as a matter of custom and practice, the width of the territorial sea had been recognized as three nautical miles based on the centuries-old “cannon shot rule.”²² Concerns about foreign intrusion into traditional fishing grounds resulted in some nations asserting territorial sea limits well beyond three nautical miles.²³ In order to address the problem without

¹⁷ U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm [hereinafter UNCLOS III].

¹⁸ Convention on the Territorial Sea and the Contiguous Zone art. 5, Apr. 29, 1958, 516 U.N.T.S. 205; UNCLOS III, *supra* note 17, art. 8.

¹⁹ See Convention on the Territorial Sea and the Contiguous Zone, *supra* note 18, arts. 1, 14, 16. See also UNCLOS III, *supra* note 17, art. 2; U.S. Dep’t of State, Bureau of Public Affairs, *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary*, Vol. 6, Supp. No. 1 (Feb. 1995), available at http://www.jag.navy.mil/organization/documents/Senate_Transmittal.pdf (“Article 2 makes clear the generally recognized rule that coastal State sovereignty extends to internal waters.”).

²⁰ *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary*, *supra* note 19.

²¹ Convention on the Territorial Sea and the Contiguous Zone, *supra* note 18, art. 1.

²² See 3 MICHAEL REED, *SHORE AND SEA BOUNDARIES* 123 n.184 (2000); SOHN ET AL., *supra* note 16, at 210.

²³ See SOHN ET AL., *supra* note 17, at 210–11.

extending the territorial sea, nations agreed to the use of a 200 nautical mile fishery conservation zone.²⁴

The 1982 Law of the Sea Convention resulted in the recognition of this 200 nautical mile Exclusive Economic Zone (EEZ)²⁵ and reinforced the concept of the territorial sea, but clarified that this sovereign control extended “to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.”²⁶ Today, the territorial sea is customarily recognized to include waters up to twelve miles from a coastal state’s baseline.²⁷

A coastal state exercises sovereignty over its territorial sea, as well as the air space above the sea and the seabed and subsoil below sea.²⁸ Ships from all states enjoy the right of innocent passage while traversing the territorial sea, “subject to laws and regulations adopted by the coastal State that are in conformity with the 1982 Law of the Sea Convention and other rules of international law relating to such passage.”²⁹

3. *Contiguous Zone*

The 1958 Convention on the Territorial Sea and the Contiguous Zone also recognized a contiguous zone that exists beyond the territorial sea.³⁰ Within this zone, the Convention recognized that coastal states had the right to “exercise the control necessary to (a)

²⁴ *Id.*

²⁵ See UNCLOS III, *supra* note 17, art. 57.

²⁶ *Id.* art. 3.

²⁷ Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988); U.S. Dep’t of State, *supra* note 19.

The adoption of the Convention has significantly influenced State practice. Prior to 1982, as many as 25 States claimed territorial seas broader than 12 miles (with attendant detriment to the freedoms of navigation and overflight essential to U.S. national security and commercial interests), while 30 States, including the United States, claimed a territorial sea of less than 12 miles. Since 1983, State practice in asserting territorial sea claims has largely coalesced around the 12 mile maximum breadth set by the Convention. As of January 1, 1994 128 States claim a territorial sea of 12 miles or less; only 17 States claim a territorial sea broader than 12 miles.

Id.

²⁸ UNCLOS III, *supra* note 17, art. 2; *Maritime Zones and Boundaries*, NOAA OFFICE OF THE GENERAL COUNSEL (Sept. 12, 2012, 7:04 AM), http://www.gc.noaa.gov/gcil_maritime.html#internal.

²⁹ NOAA OFFICE OF THE GENERAL COUNSEL, *supra* note 28; See also UNCLOS III, *supra* note 17, arts. 17–19.

³⁰ Convention on the Territorial Sea and the Contiguous Zone, *supra* note 18, art. 24, sec. 1.

Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea” and (b) to punish any such infringements.³¹ The Convention established that “The contiguous zone may not extend beyond twelve nautical miles from the baselines from which the breadth of the territorial sea is measured.”³² The 1982 Law of the Sea Convention generally adopted these contiguous zone principles.³³ However, in addition to the rights recognized by the 1958 Convention, the 1982 Convention also recognized a coastal states’ right to protect any archeological resources within the contiguous zone from unauthorized removal and to enforce this right against foreign flagged vessels and nationals.³⁴

4. Continental Shelf

The principle that a coastal state had certain rights to the subsoil and seabed of the submarine areas that extend beyond its territorial sea began in 1945, when President Truman issued the Continental Shelf Proclamation.³⁵ Simply put, the proclamation claimed United States jurisdiction and control over resources found in the subsoil or seabed of the continental shelf. A series of international claims and agreements concerning the subsoil and seabed of the continental shelf followed the proclamation.³⁶ Soon after, the United States followed with the 1953 Outer Continental Shelf Lands Act,³⁷ designed to regulate the exploration and extraction of resources on the continental shelf.³⁸ Related, and in light of the United States Supreme Court

³¹ *Id.* art. 24, sec. 1, paras. a–b.

³² Convention on the Territorial Sea and the Contiguous Zone, *supra* note 18, at art. 24, sec. 2.

³³ See UNCLOS III, *supra* note 17.

³⁴ UNCLOS III, *supra* note 17, art. 303, sec. 2. See also Proclamation No. 7219, 64 Fed. Reg. 48,701 (Sept. 2, 1999) (“Extension of the contiguous zone of the United States to the limits permitted by international law . . . is an important step in preventing the removal of cultural heritage found within 24 nautical miles of the baseline”).

³⁵ Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945).

³⁶ SOHN ET AL., *supra* note 16, at 300.

³⁷ Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (2006).

³⁸ SOHN ET AL., *supra* note 16, at 318. But see *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 340 (5th Cir. 1978) (holding that the Outer Continental Shelf Lands Act did “not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil.”).

ruling in *United States v. California*,³⁹ the United States Congress additionally passed the Submerged Lands Act in 1953,⁴⁰ similarly tied to the exploitation of natural resources in the subsoil and seabed.⁴¹

In 1958, the first Conference on the Law of the Sea tackled the issue, issuing the Convention on the Continental Shelf (the Convention). The Convention recognized that coastal states have sovereign rights over natural resources extracted from the subsoil and seabed of their adjacent continental shelf.⁴² The Convention defined the continental shelf as referring:

(a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.⁴³

The 1982 Law of the Sea Convention expanded and refined member states' rights with respect to the continental shelf. The Convention redefined the boundaries of the continental shelf as comprising:

the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.⁴⁴

The 1982 Convention also expanded upon and refined many other aspects of the 1958 Convention.⁴⁵ For example, the 1982 Convention refined the definition of natural resources to include:

mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are

³⁹ *U.S. v. California*, 332 U.S. 19 (1947) (holding that the State of California could not claim sovereign rights over the three mile marginal ocean belt off its coastline, or the land beneath it). See also REED, *supra* note 22, at 5–10.

⁴⁰ See REED, *supra* note 22, at 18–22.

⁴¹ *Id.*

⁴² Convention on the Continental Shelf art. 2, Apr. 29, 1958, 499 U.N.T.S. 311.

⁴³ *Id.* art. 1.

⁴⁴ UNCLOS III, *supra* note 17, art. 76.

⁴⁵ See *id.* arts. 76–85.

immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.⁴⁶

It is now widely accepted that a coastal state's sovereign rights over the continental shelf do not extend directly to govern UCH sites resting on the shelf beyond the twenty-four nautical mile contiguous zone.⁴⁷ However, coastal states are still able to indirectly regulate such UCH sites by exercising control over certain seabed or subsoil activities that affect natural resources on the continental shelf.⁴⁸ For example, UNCLOS III Article 81 recognizes that: "The coastal State shall have the exclusive right to authorize and regulate drilling on the continental shelf *for all purposes*."⁴⁹ Since Article 81 recognizes a coastal state's sovereignty over drilling for any purposes, presumably including salvage operations, a coastal state could exercise control over any salvage activities that arguably constitute drilling.⁵⁰ Similarly, UNCLOS III Article 80 recognizes that coastal states have certain rights over "artificial islands, installations and structures on the continental shelf."⁵¹ Therefore, if a coastal state declares a UCH site to be an artificial island, structure, or installation, the coastal state may have certain regulatory rights over the site.⁵² The coastal state may also be able to prevent salvaging activities that remove UCH from a declared artificial island, structure, or installation. For example, UNCLOS III Article 60, Section 4 recognizes a coastal state's right, where necessary, to "take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures."⁵³ Such indirect regulatory schemes have the potential to provide significant protections for UCH on the continental shelf.

⁴⁶ *Id.* art. 77, sec. 4.

⁴⁷ Anastasia Strati, *Protection of the Underwater Cultural Heritage*, in UNRESOLVED ISSUES AND NEW CHALLENGES TO THE LAW OF THE SEA: TIME BEFORE & TIME AFTER, 21, 31 n.27 (Strati ed., 2006).

⁴⁸ *Id.* See also Ole Varmer, *A Perspective from Across the Atlantic*, in THE UNESCO CONVENTION FOR THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: PROCEEDINGS OF THE BURLINGTON HOUSE SEMINAR 23, 24–25 (Oct. 25, 2006).

⁴⁹ Compare UNCLOS III, *supra* note 17, at art. 81 (emphasis added), with Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40, available at <http://unesdoc.unesco.org/images/0012/001260/126065e.pdf> [hereinafter UNESCO Convention].

⁵⁰ Varmer, *supra* note 48.

⁵¹ UNCLOS III, *supra* note 17, art. 80; see also *id.* art. 60, sec. 4.

⁵² UNCLOS III, *supra* note 17, art. 80; see also *id.* art. 56, sec. 1, para. a.

⁵³ UNCLOS III, *supra* note 17, art. 60, sec. 4.

5. *Exclusive Economic Zone*

The waters that consist of what is now known as the Exclusive Economic Zone (EEZ) were once considered to be high seas and part of the international commons. However, this changed starting in 1945, when President Truman issued a proclamation asserting that the United States had certain rights in the fisheries and other natural resources in the water column adjacent to the United States' territorial sea.⁵⁴ A series of similar proclamations and agreements followed internationally until many of these principles were captured in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.

The 1958 Convention set forth a framework favoring international agreement and cooperation as the primary mechanism to conserve fisheries and other marine resources.⁵⁵ However, if such cooperation failed, the Convention also recognized a coastal state's right to "adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea."⁵⁶

The 1982 Law of the Sea Convention expanded upon these principles by recognizing that coastal states had sovereign rights over fisheries and other marine resources in waters adjacent to the territorial sea, up to 200 nautical miles from the appropriate baseline.⁵⁷ These sovereign rights include fisheries conservation, natural resource exploration and exploitation, energy production, and other possible economic uses of waters within this 200-mile exclusive economic zone.⁵⁸ However, these rights do not extend to block traditional notions of free navigation. Balancing these competing interests, the Convention recognized that vessels from foreign states had a right to navigate the waters of another states' EEZ, on the condition that all passing vessels exercise "due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention."⁵⁹

⁵⁴ Proclamation No. 2668, 3 C.F.R. 68 (1945).

⁵⁵ Convention on Fishing and Conservation of the Living Resources of the High Seas, arts. 1–7, Apr. 29, 1958, 17 U.S.T. 138, 559 U.N.T.S. 285.

⁵⁶ *Id.* art. 7, sec. 1.

⁵⁷ UNCLOS III, *supra* note 17, arts. 55–75.

⁵⁸ *Id.* art. 56.

⁵⁹ *Id.* art. 58, sec. 3.

As with the continental shelf, UCH is widely recognized to fall outside the exclusive jurisdiction of a coastal state exercising sovereign rights in its EEZ. However, in similar fashion to the regime governing the continental shelf, states have the ability to indirectly regulate UCH sites, including human remains, located in the EEZ by exercising control over energy production, natural resource exploration, and other activities that fall within sovereign control.⁶⁰ For example, shipwrecks that feature aquatic life may fall under the sovereign rights of a coastal state “to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield”⁶¹ The Convention also recognizes that “[n]ationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State,” including “licensing of fishermen, fishing vessels and equipment”⁶² and “determining the species which may be caught, and fixing quotas of catch” Thus, via its sovereign rights to regulate activities that affect certain aquatic life, a coastal state may be able to exercise indirect control over UCH in its EEZ.⁶³

6. High Seas

While the term high seas has meant many things throughout maritime history, the 1958 Convention on the High Seas defined the term to include “all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”⁶⁴ The Convention recognized that the high seas were “open to all nations” such that no state could “validly purport to subject any part of them to its

⁶⁰ See U.S. Dep’t of State, *supra* note 19.

The coastal State does not have sovereignty over the EEZ, and all States enjoy the high seas freedoms of navigation, overflight, laying and maintenance of submarine cables and pipelines, and related uses in the EEZ, compatible with other Convention provisions. However, all States have a duty, in the EEZ, to comply with the laws and regulations adopted by the coastal State in accordance with the Convention and other compatible rules of international law.

Id.

⁶¹ UNCLOS III, *supra* note 17, art. 61, sec. 3.

⁶² *Id.* art. 62, sec. 4.

⁶³ See also Sarah Dromgoole, *Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage*, INT’L J. MARINE & COASTAL L., 33–61 (2010) (discussing the possibilities and practicalities for indirect regulation of UCH through LOSC marine scientific research provisions).

⁶⁴ Convention on the High Seas art. 1, Apr. 29, 1958, 450 U.N.T.S. 11.

sovereignty.”⁶⁵ By the time of the 1982 Convention, the concept of high seas had evolved. The 1982 Convention redefined the extent of coastal states’ rights and jurisdiction over the EEZ and the high seas such that the high seas were no longer adjacent to the territorial sea but rather limited to include “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”⁶⁶ The 1982 Convention reiterated that it was improper for any state to “validly purport to subject any part of the high seas to its sovereignty,”⁶⁷ and explicitly recognized that the high seas were available to any state for the purposes of navigation, laying pipeline or cable, and conducting scientific research, among other uses consistent with the Convention—also implicating the regime for the corresponding seabed under the high seas now known as the Area.⁶⁸

7. *The Area*

The 1982 Convention first recognized that a separate maritime scheme governed the Area outside the continental shelf, defined to mean “the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.”⁶⁹ The Convention recognized that “The Area and its resources are the common heritage of mankind,”⁷⁰ and that “[n]o State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.”⁷¹

B. Sovereign Immunity in the Law of the Sea

Under public international law (the treaties and customary law that govern interactions between nations), the concept of sovereign immunity, one of the oldest principles of international law, generally means that one international state is immune from the jurisdiction and enforcement of the laws of another state, unless said state expressly

⁶⁵ *Id.* art. 2.

⁶⁶ UNCLOS III, *supra* note 17, art. 86.

⁶⁷ *Id.*

⁶⁸ *Id.* art. 1, sec. 1.

⁶⁹ *Id.*

⁷⁰ *Id.* art. 136.

⁷¹ *Id.* art. 137, 1.

consents to the application and enforcement of such foreign law.⁷² Despite originating as a public international law concept, the idea of sovereign immunity has crept into the private international law arena of salvage through such mechanisms as the International Maritime Organization's Salvage Convention⁷³ and the Convention on the Law of the Sea.

*1. Merchant Vessels vs. Military Warships and Other Public Vessels
Subject to Sovereign Immunity—Codifying the Distinction in the
Laws of Salvage and Admiralty Jurisdiction*

The 1958 Convention on the High Seas cemented the distinction between merchant vessels, military warships, and other public vessels subject to sovereign immunity between nations. Through the Convention, member states officially recognized that in order for a vessel to be considered a warship, four elements must be satisfied: the vessel must (1) belong to the naval forces of a state, (2) bear external marks signifying its nationality, (3) sail “under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and [(4) be] manned by a crew who are under regular naval discipline.”⁷⁴ For those vessels that met this definition, the Convention recognized “complete immunity from the jurisdiction of any State other than the flag State.”⁷⁵ With one exception for state-owned vessels in non-commercial service, any vessel that did not meet the definition of “warship” or other public vessel was not offered such immunity [hereinafter such vessels will be referred to as “merchant vessels”].⁷⁶

2. The Distinction is Codified in the Law of the Sea Convention

In 1982, the Law of the Sea Convention adopted verbatim the definition of warship employed by the 1958 Convention on the High

⁷² THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 243–59 (4th ed. 2007). *See also* G.A. Res. 59/38, U.N. Doc. A/59/49 (Dec. 2, 2004), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf.

⁷³ *See, e.g.*, International Convention on Salvage, art. 4, sec. 1, Apr. 28, 1989, 1953 U.N.T.S. 194 (“Without prejudice to article 5, this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognized principles of international law unless that State decides otherwise.”).

⁷⁴ Convention on the High Seas, *supra* note 64, art. 8, sec. 2.

⁷⁵ *Id.* art. 8, sec. 1.

⁷⁶ *Id.* arts. 8–9.

Seas.⁷⁷ The 1982 Convention also recognized and reiterated that warships, as well as state-owned non-commercial vessels,⁷⁸ have “complete immunity” on the high seas from all except the flag state⁷⁹ [hereinafter such vessels shall be referred to as “sovereign vessels”].

Under the implication of sovereign immunity, the 1982 Convention also recognized that warships and “other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service” are not subject to the Convention’s provisions concerning the protection of the marine environment.⁸⁰ However, the Convention also recognized that flag states should adopt appropriate measures for sovereign vessels and aircraft “in a manner consistent, so far as is reasonable and practicable, with [the] Convention.”⁸¹

Member States of the Convention also acknowledged that this recognition or codification of sovereign immunity did not necessarily apply uninhibited in another coastal state’s territorial waters and inland waters (for example, innocent passage does not apply in internal waters). To this end, Article 30 set forth the requirement that a sovereign vessel must respect the laws and regulations of the coastal state in whose territorial waters it crossed.⁸² In comparison, while flag states were explicitly found to have jurisdiction over all merchant vessels flying the state’s flag,⁸³ they were not given the same exclusive jurisdiction over merchant vessels as was provided sovereign vessels.⁸⁴

⁷⁷ UNCLOS III, *supra* note 17, art. 29.

⁷⁸ *See id.* art. 32.

⁷⁹ *Id.* arts. 95–96.

⁸⁰ *Id.*, art. 236. The article reads in full:

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

Id.

⁸¹ *Id.*

⁸² *Id.* art. 30.

⁸³ *See generally* UNCLOS III, *supra* note 17.

⁸⁴ *Id.* art. 27-28.

C. To Protect Underwater Cultural Heritage

The 1982 Law of the Sea Convention recognized for the first time in Article 303 that “States have the duty to protect objects of an archeological and historical nature found at sea and shall co-operate for this purpose.”⁸⁵ Article 149 added to this, stating that “[a]ll objects of an archeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole.”⁸⁶ Presumably, human remains would be encompassed under these provisions as objects of archeological and historical nature, although the Convention makes no such explicit reference.

In addition to Articles 303 and 149, coastal states were explicitly recognized to have the jurisdiction necessary to prevent illegal trafficking in qualifying artifacts in the territorial sea and contiguous zone.⁸⁷ However, the Convention remained ambiguous as far as determining who had jurisdiction over these artifacts on the high seas. On one hand, the Convention appeared to recognize the jurisdiction of flag states.⁸⁸ On the other hand, the Convention also recognized that, where objects of archeology were concerned, particular regard should be paid to the preferential rights of “the State or country of origin, or the State of cultural origin, or the State of historical and archeological origin.”⁸⁹ An unresolved and uneasy tension remained between these provisions.

The intersection of these provisions governing maritime jurisdictions, archeological resources, and sovereign vessels established a foundation for regulating the potential recovery of human remains from underwater cultural heritage sites.

III

INTERACTING WITH HUMAN REMAINS AT UNDERWATER CULTURAL HERITAGE SITES

For most of the last century, there have been large gaps in the international and domestic laws governing activities directed at UCH. The laws and regulations governing UCH that did exist generally offered no clear procedural guidance with respect to human remains found at UCH sites. Left with the task of interpreting the ambiguous

⁸⁵ *Id.* art. 303, sec. 1.

⁸⁶ *Id.* art. 149.

⁸⁷ *Id.* arts. 33, 303, sec. 2.

⁸⁸ *See id.* art. 94.

⁸⁹ UNCLOS III, *supra* note 17, art. 149.

UCH provisions of UNCLOS III, a few primary trends began to emerge.

A. Regulating Human Remains Through Convention(s) of the United Nations Educational, Scientific, and Cultural Organization

Article 303, Section 4 of the Law of the Sea Convention provides that “[t]his article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.”⁹⁰ Understanding this provision to contemplate subsequent UCH conventions or international agreements,⁹¹ the United Nations Educational, Scientific, and Cultural Organization (UNESCO) formed the Convention on the Protection of the Underwater Cultural Heritage in 2001 (2001 UNESCO Convention) as a mechanism to prevent the looting and unscientific salvage of UCH.⁹² The 2001 UNESCO Convention was the first large-scale international agreement that explicitly recognized the need to make some distinction between the protection of human remains and the preservation of other UCH.

The 2001 UNESCO Convention explicitly applies only to UCH. “Underwater cultural heritage,” according to the Convention, means:

all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.⁹³

Thus, human remains explicitly fall within the provisions of the Convention. The extent of this provision, however, is perhaps ambiguous. For example, the Convention does not appear to clearly answer the question of whether human remains that have been underwater for at least 100 years are themselves UCH, or whether such remains must be found at UCH sites in order to fall within the scope of the Convention.

⁹⁰ *Id.* art. 303, sec. 4.

⁹¹ *See id.*

⁹² Varmer, *supra* note 48, at 376.

⁹³ UNESCO Convention, *supra* note 49, art. 1, sec. 1, para. a.

Human remains are explicitly referenced in two other provisions of the 2001 UNESCO Convention. First, Article 2, Section 9 of the Convention recognizes that “States Parties shall ensure that *proper respect* is given to all human remains located in maritime waters.”⁹⁴ Secondly, the Annex Rules attached to the Convention also reference human remains. Rule 5 states that: “Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.”⁹⁵

Despite these explicit references to human remains in the Convention, the application of such regulation to human remains at sea remains ambiguous. The Convention does not further define what constitutes “proper respect,” and does not detail what necessitates a disturbance in accordance with the Annex Rules. The Convention requires preservation of the wreck site and the conservation of any recovered underwater cultural heritage, yet it remains unclear how these provisions and obligations would apply to human remains and the respect they are to be afforded.

Currently, the Convention on the Protection of the Underwater Cultural Heritage has not been as widely adopted as perhaps many of the one hundred and six nations participating in the negotiations had hoped.⁹⁶ As of this writing, only forty-one states have agreed to be bound by the terms of the agreement.⁹⁷ Many non-member states are members of UNESCO and have agreed to be bound by other UNESCO Conventions such as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (122 member states)⁹⁸ and the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (190 member states).⁹⁹ For example, the United States and the United Kingdom are both parties to the above referenced UNESCO Conventions but neither has become parties to the 2001 UNESCO Convention.¹⁰⁰ Both the United

⁹⁴ *Id.* art. 2, sec. 9 (emphasis added).

⁹⁵ *Id.* art. 16.

⁹⁶ The Convention was adopted with 87 votes for, 4 votes against, and 15 abstentions.

⁹⁷ See UNESCO Convention, *supra* note 49.

⁹⁸ See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 10 I.L.M. 289, available at <http://portal.unesco.org/la/convention.asp?KO=13039&language=E&order=alpha>.

⁹⁹ See Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37 available at <http://portal.unesco.org/la/convention.asp?KO=13055&language=E&order=alpha>.

¹⁰⁰ See UNCLOS III, *supra* note 17.

States and United Kingdom have indicated that they are hesitant to ratify the treaty due to concerns over “creeping coastal state jurisdiction”—the idea that coastal states are gaining more exclusive rights on the continental shelf and in the EEZ with the formulation of each new convention.¹⁰¹ Additionally, some states, such as the United States, are concerned about the 2001 UNESCO Convention’s treatment of sunken sovereign vessels.¹⁰²

The concerns about ‘creeping jurisdiction’ are not without some substance. Under the Law of the Sea, a coastal state was recognized to hold exclusive rights in the preservation of UCH in its territorial sea and contiguous zones. In order to control activities aimed at UCH, including human remains, beyond these areas, a coastal state was forced to revert to other mechanisms of jurisdiction, such as flag or port authority, or regulation through indirect means. In contrast, under Article 10 of the 2001 UNESCO Convention, a coastal state is recognized to have the authority to “prohibit or authorize any activity directed at” UCH sites, including human remains, within its exclusive economic zone or on its continental shelf.¹⁰³

However, this authority to prohibit or authorize activity directed at UCH sites is only enforceable against the flagged vessels and nationals of other member states.¹⁰⁴ Thus, arguably, the Convention is not an agreement to extend coastal state jurisdiction.¹⁰⁵ Rather, it is an agreement regarding consent that flag states may give under existing international law to enforce the laws of a coastal state against vessels and nationals of the flag state.¹⁰⁶ This regime is also restricted to scenarios where such is necessary in order to “prevent interference with [the coastal States’] sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.”¹⁰⁷

In addition, a member state that discovers UCH in its EEZ or on its continental shelf is expected to notify all states with a “declared interest” in the UCH in order to form an agreement on preservation

¹⁰¹ See Varmer, *supra* note 48, at 2; Varmer et al., *United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 5 J. MAR. ARCHAEOLOGY 131 (2010).

¹⁰² See Varmer et al., *supra* note 101, at 131.

¹⁰³ UNESCO Convention, *supra* note 49, art. 10, sec. 2.

¹⁰⁴ See *id.* arts. 1, 26.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ *Id.* art. 10, sec. 2.

methodology.¹⁰⁸ Once the flag state of the UCH is determined and notified, the flag state may decide that it will take the lead in protection and management, or it may decide that the coastal state should continue to take the lead in protection and management as it is in the best position to do so.¹⁰⁹ Thus, while setting up a process in which a coastal state may protect and manage foreign flagged UCH on its continental shelf—particularly when the flag state of such UCH may be unknown—the Convention respects the consent regime required for sunken state craft, as well as the flag state jurisdiction applicable to even privately owned vessels in a fashion that is arguably consistent with the balancing of interest of flag states and coastal states under the Law of the Sea Convention.

B. Sovereign Immunity, Sunken State Craft, and the 2001 UNESCO Convention

As indicated above, the 2001 UNESCO Convention more specifically attempts to balance the interests of flag states concerning the wrecks of state vessels and traditional notions of a warships' sovereign immunity with the rights of coastal states to UCH in their territorial sea, EEZ, and on their continental shelves. To this end, the Convention recognizes three distinct methodologies governing activities directed at sunken state craft. First, within a member state's archipelagic and territorial waters, Article 7, Section 3 states that:

States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.¹¹⁰

Secondly, for the wrecks of sovereign vessels in a member States' EEZ or on the continental shelf, Article 10, Section 7, provides that "[n]o activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the coordinating State."¹¹¹ Third, and lastly, for the wrecks of state craft in the Area, Article 12, Section 7 recognizes that "[n]o State Party shall undertake or authorize activities directed at State vessels and

¹⁰⁸ UNESCO Convention, *supra* note 49, art. 10, secs. 3–7.

¹⁰⁹ *Id.* art. 10, sec. 3.

¹¹⁰ *Id.* art. 7, sec. 3.

¹¹¹ *Id.* art. 10, sec. 7.

aircraft in the Area without the consent of the flag State.”¹¹² Thus, the 2001 UNESCO Convention sets out a three-tier approach to balancing the interests of sovereign immunity with a coastal states’ interests, where the flag state gains more direct control over its sovereign UCH the farther one moves away from shore. A coastal state that discovers the wreck of another state’s sovereign vessel in archipelagic or territorial waters should inform the flag state of the wreck. A coastal state may not conduct activities directed at UCH in the EEZ or on the continental shelf without agreement by the flag state. Finally, no state can direct activities at sunken state craft in the area without flag state consent.

Further, while Article 236 of the Law of the Sea Convention does expressly provide for sovereign immunity of warships and other public vessels on non-commercial service from other UNCLOS III provisions regarding protection and preservation of the marine environment, since UCH and human remains are not part of the marine environment for purposes of the UNCLOS III, the above provisions under the 2001 UNESCO Convention may be argued to go further in preserving the principle of sovereign immunity than the UNCLOS III—at least with respect to the protection and preservation of state craft in the EEZ and high seas.¹¹³

The Sunken Military Craft Act and the Protection of Military Remains Act are good examples of domestic legislation that would implement international obligation with respect to activities directed at UCH sites that are also warships or other public vessels subject to sovereign immunity.

C. Regulation via Limited Bi-Lateral or Multi-Lateral Treaties

The Law of the Sea Convention is a framework convention that does little to address how nations should protect and manage UCH, much less how to treat any associated human remains. However, as indicated above, UNCLOS III Article 303, Section 4 appears to have contemplated more specific agreements with respect to the protection and management of UCH.¹¹⁴ The 2001 UNESCO Convention is the only multi-lateral international agreement regarding protection and management of UCH to include some provisions on the respectful

¹¹² *Id.* art. 12, sec. 7.

¹¹³ See generally UNCLOS III, *supra* note 17, art. 236.

¹¹⁴ *Id.* art. 303, sec. 4.

treatment of associated human remains.¹¹⁵ Similar to UNCLOS III, under Article 6 of the 2001 UNESCO Convention parties are encouraged to develop bi-lateral or multi-lateral agreements consistent with the Convention. States often enter into such bi-lateral or limited multi-lateral treaties in order to increase or clarify the protections offered to specific cultural heritage sites of great national or international importance.¹¹⁶ Provisions for the protection of any human remains recovered at such sites are sometimes included in these agreements.

1. Agreements Concerning Shipwrecks on the High Seas

The number of shipwrecks in international waters far exceeds the number of bi-lateral or multi-lateral agreements concerning specific shipwrecks. Perhaps the primary reason for this absence of cooperation amongst states concerning wrecks on the high seas is that such wrecks have not yet been discovered. Or, even if discovered, perhaps the wrecks lay in waters of great depths and were unreachable by even the most savvy treasure hunters for the majority of the last century. However, technological developments over the last two decades have provided access to many of these wrecks of the great abyss. With this greater accessibility comes the need to regulate and protect shipwrecks and any human remains contained therein. The two most prevalent agreements concerning shipwrecks in international waters regulate access to the *MS Estonia*¹¹⁷ and the *RMS Titanic*.¹¹⁸

The *MS Estonia* was a cruise ship on route from Sweden to Estonia when it sunk due to an unknown cause in international waters in the Baltic Sea. Hundreds of passengers were carried to the bottom, confined within the hull of the vessel. Seeking to protect the wreck as the final resting place of those who perished, Sweden, Estonia, and

¹¹⁵ See UNESCO Convention, *supra* note 49.

¹¹⁶ In fact, UNCLOS III and the Convention on the Protection of the Underwater Cultural Heritage anticipate and recommend the formation of such additional international agreements. UNCLOS III, *supra* note 17, art. 303, sec. 4; UNESCO Convention, *supra* note 49, art. 6 ("States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage.").

¹¹⁷ The *MS Estonia* sank twenty-two miles off the coast of Finland, in the Baltic Sea. Since Finland claims a contiguous zone that extends only fourteen miles from baseline, the wreck site is outside the sovereignty of Finland.

¹¹⁸ The *RMS Titanic* sank approximately 400 miles south of Newfoundland, in the Atlantic Ocean, on Canada's continental shelf.

Finland entered into the *Agreement Between the Republic of Estonia, the Republic of Finland, and the Kingdom of Sweden Regarding the M/S Estonia* (Estonia Agreement). The Estonia Agreement mandated that all human remains on the wreck were to be given “appropriate respect,” and implied that such respect could only be achieved through a policy of non-disturbance.¹¹⁹ To protect the remains from disturbing activities, the Agreement prohibits any “activities disturbing the peace of the final place of rest, in particular any diving or other activities with the purpose of recovering victims or property from the wreck or the sea-bed.”¹²⁰ The Agreement also forbids raising the wreck from the depths, with no exceptions.¹²¹

The proximity of the wreck, which occurred in 1994, to the signing of the Estonia Agreement in 1995, provides the best explanation for the policy of absolute non-disturbance found in the Agreement. In fact, the Agreement was, in essence, a token of recognition intended to soothe the grief of those who lost loved ones aboard the wreck. By imposing a policy of non-disturbance without exception, the wreck of the MS *Estonia* became an untouchable memorial at sea for those who perished.

The same pressing social and political concerns that inspired the Estonia Agreement played a less significant role in the signing of the *Agreement Concerning the Shipwrecked Vessel RMS Titanic* (Titanic Agreement) in 2003. When the RMS *Titanic*, which sank in the North Atlantic in 1912, was rediscovered in 1985, only a few survivors remained from the wreck. Today, the number of survivors has dwindled significantly. The diminished impact of the wreck on the current populace resulted in the establishment of an international agreement that was more able to compromise between the interests of preserving the wreck as a memorial and the interests of studying the wreck as an artifact of great historical, cultural, and scientific worth.

In accordance with this counterbalancing philosophy, the Titanic Agreement sets forth a policy of preferred non-disturbance, and requires that “appropriate respect” be given to any human remains encountered at the wreck site.¹²² To this end, the Titanic Agreement

¹¹⁹ Agreement Between the Republic of Estonia, the Republic of Finland and the Kingdom of Sweden Regarding the M/S Estonia, Est.-Fin.-Swed., art. 1, Feb. 23, 1995.

¹²⁰ *Id.* art. 4.

¹²¹ *Id.* art. 3.

¹²² Agreement Concerning the Shipwrecked Vessel RMS Titanic, Nov. 6, 2003, art. 2, sec. a, available at <http://www.gc.noaa.gov/documents/titanic-agreement.pdf>.

specifically provides protection to human remains in two separate provisions. First, Article 4, Section 1 requires member states to regulate entry into the hull of the wreck to prevent unauthorized disturbance of any human remains contained therein.¹²³ Secondly, Annex Rule 2 states that “[a]ctivities shall avoid disturbance of human remains.”¹²⁴

Despite these protections, human remains may potentially be disturbed under the Titanic Agreement if such disturbance is justified by “educational, scientific, or cultural interests, including the need to protect the integrity of RMS *Titanic* and/or its artifacts from a significant threat.”¹²⁵ Appropriate respect must still presumably be provided to the remains, even in the event of disturbance or removal.

Even though the provisions of the Estonia Agreement and the Titanic Agreement are limited to their respective shipwrecks and enforceable only with respect to states that are parties to the accord, these treaties act as empirical models for the development of future agreements that regulate interaction with human remains on shipwrecked vessels.

2. Agreements Concerning Shipwrecks in Territorial Waters

A majority of international shipwreck agreements govern sovereign vessels that lie in the territorial waters of a coastal state. Recognizing some potential overlap in the interplay between a foreign sovereign’s ownership and “immunity” under international law and the rights, jurisdiction, and control of a coastal state with respect to shipwrecks in territorial waters, states have often opted to negotiate treaties to govern the wrecks of sovereign vessels in territorial waters. Some of these agreements provide guidance on the potential methods available for the regulation of human remains at sea.

The *Exchange of Notes Constituting an Agreement Regarding the Salvage of HMS Spartan* was established to govern efforts to scrap the wreck of a British cruiser that was sunk off the coast of Italy during a German bombing raid. The agreement, formulated within eight years of the wreck, contained explicit provisions governing the treatment of any human remains encountered at the wreck site. Specifically, Article 5 requires “[t]he Italian Government undertake that all necessary steps will be taken to deliver to the Naval Attaché

¹²³ *Id.* art. 4, sec. 1.

¹²⁴ *Id.* at Annex Rule 2.

¹²⁵ *Id.* art. 4, sec. 2.

of this Embassy the bodies of any British Naval personnel which may be found in the course of the salvage operations.”¹²⁶ Presumably, the establishment of such a recover and return policy is most desirable in situations where, as with the HMS *Spartan*, the Agreement governs a wreck that occurred in the recent past.¹²⁷

The *Exchange of Letters Constituting an Agreement Concerning the Regulation of the Terms of Settlement of the Salvaging of the Wreck of HMS Birkenhead* was established in 1989 to govern excavation efforts aimed at the wreck of the HMS *Birkenhead*, which sunk off the coast of present day South Africa in 1852. Despite the presence of a large number of civilians on board the vessel at the time of its demise, the agreement classified the wreck as a military grave, and therefore required that any human remains discovered at the wreck site be treated “reverently.”¹²⁸ Such reverence included an explicit mandate that salvors were to “refrain from disturbing or bringing to the surface any human remains which may be discovered at the site of the wreck or in its vicinity.”¹²⁹ This policy of absolute non-disturbance echoes the policy found in the Estonia Agreement.

The *La Belle* was a French exploration vessel that sunk off the coast of Texas in 1686. In 2003, the United States and France entered into the *Agreement Between the Government of the United States of America and the Government of the French Republic Regarding the Wreck of the La Belle* to govern excavation efforts aimed at the wreck site. Article 1, Section 2 of the agreement reaffirmed that France held sole title to the wrecked vessel.¹³⁰ Despite this reaffirmation, the agreement generally struck a balance between the interests of France and the interests of Texas in studying the wreck. This balancing act is seen in Article 3, Section 3, the provision that governs human remains, which states: “[t]reatment and burial of human remains from La Salle’s exploratory mission to Texas shall be as agreed between the Ambassador of France to the United States or his designee and the

¹²⁶ Exchange of Notes Constituting an Agreement Regarding the Salvage of HMS *Spartan* art. 5, Nov. 6, 1952, 158 U.N.T.S. 431, 432–34.

¹²⁷ It should be noted, however, that the MS *Estonia* Agreement stands in stark contrast to this general presumption.

¹²⁸ Exchange of Letters Constituting an Agreement Concerning the Regulation of the Terms of Settlement of the Salvaging of the Wreck of HMS *Birkenhead*, Sept. 22, 1989, 1584 U.N.T.S. 321, 322.

¹²⁹ *Id.*

¹³⁰ Agreement Between the Government of the United States of America and the Government of the French Republic Regarding the Wreck of the *La Belle*, U.S. – Fr., art. 1, sec. 2, Mar. 31, 2003.

Commission.”¹³¹ Although this provision does not explicitly offer any protections for human remains found on the *La Belle*, it does establish a mechanism for such protections to be extended at a later point in time.

In 2004, the United States and Japan exchanged notes constituting an agreement governing the treatment of Japanese mini-submarines discovered off the coast of Hawaii. The agreement established that the wrecks of the mini-sub were to be treated as war graves. Although there is no further explicit mandate as to human remains, the agreement implicitly requires the United States to notify Japan if the wreck site is to be disturbed.¹³²

IV

THE EXTENT OF COASTAL STATE CONTROL OVER UNDERWATER CULTURAL HERITAGE GENERALLY

A. Domestic Authority over Human Remains in the Contiguous Zone

The 1982 Law of the Sea Convention recognized a coastal state's right to protect UCH within an area “24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”¹³³ Many states have adopted similar, if not identical, approaches to the 1982 Convention. For example, through Presidential Proclamation 7219, issued in 1999, the United States extended its contiguous zone “to 24 nautical miles from the baselines of the United States determined in accordance with international law, but in no case within the territorial sea of another nation.”¹³⁴ In doing so, the United States stated that the “[e]xtension of the contiguous zone of the United States to the limits permitted by international law . . . is an important step in preventing the removal of cultural heritage found within 24 nautical miles of the baseline.”¹³⁵ Presumably, human remains would be included in such protections to the extent they are associated with the remains of the cultural heritage.

Perhaps the most prominent example of state protection of UCH in the contiguous zone is the establishment, by the United States, of the

¹³¹ *Id.* art. 3, sec. 3.

¹³² Japanese Mini-Submarine Agreement, U.S. – Japan, Feb. 12, 2004.

¹³³ UNCLOS III, *supra* note 17, art. 33, sec. 2.

¹³⁴ Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999).

¹³⁵ *Id.*

Monitor National Marine Sanctuary off the coast of North Carolina.¹³⁶ The Sanctuary protects the USS *Monitor*, a American Civil War ironclad famous for its fight with the Confederate ironclad CSS *Virginia* in the Battle of Hampton Roads in 1862.¹³⁷ The USS *Monitor* subsequently sank in a storm off of Cape Hatteras in 1862. Human remains were discovered at the wreck. They were treated with the same honors given present military deceased and were ultimately removed from the wreck site and sent to a military laboratory in Hawaii to be studied and identified.¹³⁸

***B. Flag State Authority over Human Remains at Underwater
Cultural Heritage Sites Generally***

It is well established that a state may exercise rights over any vessel that flies its flag, regardless of the location of the vessel.¹³⁹ Article 94, Section 1 of the 1982 Law of the Sea Convention recognizes that: "Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."¹⁴⁰ Section 2 contemplates that such jurisdiction and control should include the assumption of "jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship."¹⁴¹ However, such flag rights do not necessarily rise to the level of sovereign rights over such vessels. Instead, flag rights must be balanced against a coastal state's right to regulate its nationals, and the coastal state's right to regulate resources in the territorial sea, the contiguous zone, on the continental shelf, and in the exclusive economic zone.¹⁴²

By the turn of the twenty-first century, many, if not most, states had passed domestic laws intended to regulate land-based archeological resources. These regulations often provided some protection, through a permit or licensing system, to human remains uncovered at archeological sites. For example, the United States'

¹³⁶ See *Monitor National Marine Sanctuary*, NOAA, <http://monitor.noaa.gov> (last visited Nov. 1, 2012). See also Varmer, *supra* note 48, at 24.

¹³⁷ See JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* 373–78 (Oxford 1988).

¹³⁸ See Heather Paynter, *Skull from USS Monitor Examined*, NAVY.MIL (Sept. 1, 2002, 9:13 AM), http://www.navy.mil/submit/display.asp?story_id=3393.

¹³⁹ See UNCLOS III, *supra* note 17, art. 94, sec. 1.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* art. 94, sec. 2.

¹⁴² See Strati, *supra* note 47, at 32.

Archeological Resources Protection Act of 1979 regulates interaction with human remains on “public lands” greater than 100 years of age.¹⁴³ Other examples include the United States Native American Graves Protection and Repatriation Act, which protects the graves of Native Americans and provides a mechanism for reburial of those remains already disturbed.¹⁴⁴ Many of these statutes have been applied by states and courts explicitly to shipwrecks,¹⁴⁵ and may potentially be applied to UCH in the high seas through flag state jurisdiction.¹⁴⁶ Additionally, a few of these statutes, such as the United States’ National Historic Preservation Act, feature provisions explicitly authorizing extra-territorial application.¹⁴⁷

C. The Distinction Between the Treatment of Human Remains on Sunken Merchant Vessels Versus Sunken Sovereign Vessels in State Law

Many states have enacted a bifurcated regulatory scheme to govern the wrecks of their flagged vessels, where the wrecks of sovereign vessels are regulated in a way distinguished from those vessels not deemed to be sovereign. This bifurcated scheme implicitly incorporates the distinction between sovereign vessels and merchant vessels featured in the 1958 Convention on the High Seas and reiterated in the 1982 Law of the Sea Conventions.

In the United States, the elevated and distinct treatment of sovereign vessels, as contrasted with the treatment of non-sovereign vessels, was first recognized in 1812 by Chief Justice Marshall in *The Schooner Exchange v. McFadden*,¹⁴⁸ a case involving a dispute over

¹⁴³ Archeological Resources Protection Act of 1979, 16 U.S.C.A. § 470bb(1) (2012).

¹⁴⁴ Native American Graves Protection and Reparation Act, 25 U.S.C. §§ 3001–3013 (1994).

¹⁴⁵ See *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*, 568 F. Supp. 1562 (S.D. Fla. 1983), *aff’d*, 758 F.2d 1511, 1515 (11th Cir. 1985).

¹⁴⁶ See UNCLOS III, *supra* note 17, art. 94 (“1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. 2. In particular every State shall . . . assume jurisdiction under its internal law over each ship flying its flag . . . in respect of administrative, technical and social matters concerning the ship.”).

¹⁴⁷ 16 U.S.C. § 470 (1966). Specifically, see *id.* § 470a-2 (“Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country’s equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.”).

¹⁴⁸ *The Schooner Exchange v. McFadden*, 11 U.S. 116 (1812).

ownership of the vessel *Balaou*, which had been seized from private U.S. citizens and subsequently used as a French military vessel. Since the United States Supreme Court determined that France held title to the vessel, the Court stated that it was barred from exercising jurisdiction over the matter by the Foreign Sovereign Immunities Act.¹⁴⁹ This view was later reinforced by the Supreme Court in *Saudi Arabia v. Nelson*, where the Court explained that under the act, “[a] foreign state, or its property, is ‘presumptively immune from the jurisdiction of United States courts; unless a specified [statutory] exception applies, a federal court lacks subject-matter jurisdiction’ over claims against it or its property.”¹⁵⁰

Consistent with the above precedent, United States courts have consistently held that foreign states retain title to the wrecks of sovereign vessels absent express abandonment.¹⁵¹ For example, in *Sea Hunt v. The Unidentified Shipwrecked Vessel*, the Fourth Circuit rejected Virginia’s claim of ownership to two sunken Spanish naval vessels resting off the Virginia coast.¹⁵² The court explained that:

[a]s sovereign vessels of Spain, LA GALGA and JUNO are covered by the 1902 Treaty of Friendship and General Relations between the United States and Spain. The reciprocal immunities established by this treaty are essential to protecting United States shipwrecks and military gravesites . . . Under the terms of the treaty, Spanish vessels, like those belonging to the United States, may only be abandoned by express acts.¹⁵³

Since Spain had not expressly abandoned either sunken vessel, Spain held title to the shipwrecks, not Virginia.¹⁵⁴ Similarly, in *United*

¹⁴⁹ *Id.*

¹⁵⁰ *Odyssey Marine Exploration, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126, 1138 (M.D. Fla. 2009) (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993)).

¹⁵¹ *See Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel*, 221 F.3d 634 (4th Cir. 2000) (noting that “[t]he express abandonment standard is regularly applied by the executive branch in dealing with foreign vessels”).

¹⁵² *Id.*

¹⁵³ *Id.* at 638.

¹⁵⁴ The court additionally found that the legislative history of the Abandoned Shipwreck Act supported this view:

The House Report . . . states ‘the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment The same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State.’”

States v. Steinmetz and *Hatteras, Inc. v. The U.S.S. Hatteras*, the courts found that the United States retained title to sovereign vessels sunk during the American Civil War.¹⁵⁵ In accord with these holdings, in *International Aircraft Recovery v. Unidentified, Wrecked and Abandoned Aircraft*, the court found that the United States still retained title to a sunken TBD-1 bomber aircraft that had flown as part of the U.S. Navy during the World Wars.¹⁵⁶ In a related note, the court in *Odyssey Marine Exploration v. Unidentified Shipwrecked Vessel* held that regardless of whether cargo on a sovereign vessel at one time belonged to a private individual, a salvor could not access such property on a sovereign shipwreck without implicating the sovereign rights of the state owner.¹⁵⁷

Consistent with this case law, in 2001, United States President Clinton explicitly explained the United States' view toward sovereign shipwrecks as follows:

Pursuant to the property clause of Article IV of the Constitution, the United States retains title indefinitely to its sunken state craft unless title has been abandoned or transferred in the manner Congress authorized or directed. The United States recognizes the rule of international law that title to foreign sunken state craft may be transferred or abandoned only in accordance with the law of the foreign flag state . . . Further, the United States recognizes that title to a United States or foreign sunken state craft, wherever located, is not extinguished by passage of time, regardless of when such sunken state craft was lost at sea.¹⁵⁸

Merchant vessels, in contrast, have not been deemed to fall within the definition of sovereign property, regardless of the flag flown. Instead, the wrecks of such vessels are treated as private property, and appear to be regulated in a manner distinct from the above treatment of sovereign vessels. For example, the court in *Odyssey Marine*

Id. at 641.

¹⁵⁵ *U.S. v. Steinmetz*, 973 F.2d 212 (3rd Cir. 1992); *Hatteras, Inc. v. The U.S.S. Hatteras*, 698 F.2d 1215 (5th Cir. 1982).

¹⁵⁶ *Int'l Aircraft Recovery v. Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255 (11th Cir. 2000). As the court explains, these holdings originate with the Property Clause of the United States Constitution, art. IV, section 3, clause 2. Summarizing the application of this clause, the court states that "[t]he Constitution gives Congress the power to dispose of all property, real and personal, belonging to the United States." *Id.* at 1258.

¹⁵⁷ *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 675 F. Supp.2d 1126 (M.D. Fla. 2009).

¹⁵⁸ Notice of President's 2001 Statement on Sunken Warships, Public Notice 4614, 69 Fed. Reg. 5647 (Feb. 5, 2004).

Exploration, citing the Eleventh Circuit decision *Guevara v. Republic of Peru*, noted that “the distinction carved out in early Supreme Court cases [dealt] with the immunities granted to armed ships as opposed [to] private trading vessels.”¹⁵⁹ Similarly, the Eleventh Circuit has made a distinction between the laws governing the salvage of a privately-owned steamship with privately-insured cargo, and sovereign craft.¹⁶⁰

The United States’ Sunken Military Craft Act of 2004 (SMCA) is a good example of legislation that applies this sovereign distinction in the context of interacting with human remains.¹⁶¹ The SMCA was designed to firmly establish that the United States has not abandoned sovereign title to its sunken sovereign vessels, aircraft, or spacecraft.¹⁶² Through the Act, the United States prohibits actions directed towards any sunken U.S. military craft and its associated contents, including human remains, unless authorized by permit or international agreement.¹⁶³ Specifically, the Act protects “the remains and personal effects of the crew and passengers of a sunken military craft that are within its debris field.”¹⁶⁴ Thus, the SMCA offers protection to human remains, not on the basis of whether the remains are civilian or military, but by designation of the shipwreck as military or non-military, in a fashion consistent with the above discussed common law precedent.¹⁶⁵

The British *Protection of Military Remains Act of 1986* operates in similar fashion to the SMCA. The Act prohibits, without an authorized license, any underwater excavation, tampering, and a range

¹⁵⁹ *Odyssey Marine Exploration*, 675 F. Supp. 2d at 1142 (citing *Guevara v. Republic of Peru*, 468 F.3d 1289 (11th Cir. 2006)).

¹⁶⁰ *See International Aircraft Recovery*, 218 F.3d at 1260 (citing *California v. Deep Sea Research*, 523 U.S. 491 (1998)).

¹⁶¹ *See also* Notice of President’s 2001 Statement on Sunken Warships, Public Notice 4614, 69 Fed. Reg. 5647 (Feb. 5, 2004) (explaining that sovereign vessels should be treated as gravesites).

¹⁶² Sunken Military Craft Act of 2004, Pub. L. No. 108-375, div. A, tit. XIV (passed Oct. 8, 2004; signed into law Oct. 28, 2004), 118 Stat. 2094 (codified at 10 U.S.C.A. app. § 113), available at <http://www.history.navy.mil/branches/org12-12a.htm>.

¹⁶³ *Id.* at § 1402.

¹⁶⁴ *Id.* at § 1408(1)(B).

¹⁶⁵ United States case law appears to be consistent with the SMCA. *See, e.g., Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel*, 221 F.3d 634 (4th Cir. 2000), *cert. denied*, 121 S. Ct. 1079 (2001); *Int’l Aircraft Recovery*, 218 F.3d 1255; *United States v. Steinmetz*, 763 F. Supp. 1293 (D.N.J. 1991), *aff’d*, 973 F.2d 212 (3rd Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); *Hatteras, Inc. v. The USS Hatteras*, 1984 A.M.C. 1094 (S.D. Tex. 1981), *aff’d*, 698 F.2d 1215 (5th Cir. 1982); *Odyssey Marine Exploration*, 675 F. Supp. 2d 1126.

of other activities directed at any aircraft or vessel that was in the service of the military at the time of its wreck.¹⁶⁶ Once again, any discovered human remains are protected based on the designation of the wrecked craft as military, as opposed to whether the deceased individual served in the military.

In contrast, neither the United States nor the United Kingdom have parallel domestic laws that explicitly protect human remains found on merchant vessels. Instead, archeologists are forced to decipher from a patchwork of state historic preservation statutes whether any regulations govern the human remains at issue, or whether improvisation is necessary.

However, although both the Sunken Military Craft Act and the Protection of Military Remains Act claim continuing sovereign title to shipwrecks, neither operates internationally under the concept of “sovereign immunity” as established for warships under the Law of the Sea Convention or as is contained in United States case law. While the Acts *are* enforced in the EEZ and high seas, this enforcement is limited to an extent that coincides more closely with the general duties of a flag state under UNCLOS III Article 94 than with the traditional rights of states over sovereign vessels. For example, the United States only enforces the Sunken Military Craft Act internationally against its own citizens, nationals, or resident aliens.¹⁶⁷ Similarly, Britain enforces the Protection of Military Remains Act on the high seas only against British citizens, subjects, protected persons, and British flagged or controlled vessels.¹⁶⁸

V

THE RECOVERY OF HUMAN REMAINS ON THE USS *MONITOR* AS A CASE STUDY FOR FURTHER DEVELOPMENT OF INTERACTION AND RECOVERY POLICIES CONCERNING HUMAN REMAINS AT SEA

The USS *Monitor*, the Union ironclad vessel famous for its fight in the Battle of Hampton Roads with the Confederate ironclad CSS *Virginia*, sunk in a storm off Cape Hatteras in 1862. Sixteen of its crew perished in the wreck.¹⁶⁹ In 1973, the wreck site was located by a group of scientists from Duke University. In 1975, the wreck site of

¹⁶⁶ Protection of Military Remains Act, 1986, c. 35, §§ 1–4, 9 (Eng.).

¹⁶⁷ Sunken Military Craft Act, *supra* note 162, § 1402(c).

¹⁶⁸ Protection of Military Remains Act, *supra* note 166, § 3.

¹⁶⁹ The Mariners’ Museum, *History*, THE MARINERS’ MUSEUM, <http://www.marinersmuseum.org/uss-monitor-center/history> (last visited Nov. 1, 2012).

the USS *Monitor* and the surrounding water column were designated as the first United States National Marine Sanctuary. During Monitor Expedition 2002, the gun turret of the USS *Monitor* was recovered from the floor of the Atlantic in a joint effort led by the Navy, National Oceanic and Atmospheric Administration, and the Mariner's Museum. During the expedition, the remains of two sailors were discovered within the confines of the turret. Some of the remains were excavated at sea on the deck of the expedition research vessel. Other remains were excavated on dry land at conservation facilities located at the Mariner's Museum.¹⁷⁰

The discovery of human remains at the USS *Monitor* wreck site did not surprise those involved in the turret recovery. Prior to the expedition, and in anticipation of the possibility that human remains could be encountered, the expedition established procedures on how to excavate and transport human biological remains discovered at the site.¹⁷¹ As the manual explains, these procedures were:

recommended by the US Army Central Identification Laboratory, Hawaii (USACILHI) for the recovery of human biological remains during Monitor Expedition 2002. They have been adapted from the protocols used by CILHI Anthropologists and Recovery Teams while engaged in processing archeological sites associated with missing U.S. Service Members. The procedures incorporate suggestions from the Monitor National Marine Sanctuary to take site conditions into account.¹⁷²

The manual states that the purpose of the procedures was to “provide guidance on the documentation, stabilization, and recovery of human biological remains and associated personal effects from the gun turret of the USS *Monitor*.”¹⁷³ The procedures also dictate that “[a]rcheological principles should at all times govern the interpretation of the context in which the remains and personal effects are found, and permit the association of personal effects with the remains in a scientifically sound manner.” To accomplish these objectives, the procedures require a number of factors to be considered during excavation, including: “the historical background of the incident, the number of individuals expected to be found, the nature of the matrix surrounding the remains, the burial process that

¹⁷⁰ *Id.*

¹⁷¹ U.S. ARMY CENTRAL IDENTIFICATION LABORATORY, MONITOR EXPEDITION 2002: EXPEDITION OPERATIONS MANUAL, App. P (2002).

¹⁷² *Id.*

¹⁷³ *Id.*

may have affected the remains, and the estimated size of the burial area.”¹⁷⁴

While the procedures recognize that “excavations methods can vary from site to site,” they also provide substantial guidance on situations likely to be encountered during the recovery of human remains.¹⁷⁵ For example, the procedures recommend establishing a perimeter of the burial area and then working from the top downward during the excavation.

Expose the remains by hand fanning the surrounding sediment matrix into the dredge system. Trowels, probes, and other metal tools should not be used as they are unforgiving to bone and can leave cut marks, scratches, and other types of damage that might be mistaken as signs of trauma . . . in some cases, waterlogged remains can be extremely spongy and fragile. Use plastic, fiberglass, or wooden implements along with soft-bristle brushes if hand fanning becomes inadequate.

The procedures also require extensive documentation of the remains and the burial site.

As the remains are discovered and exposed they should be sketched *in situ*, mapped, described in a written narrative, and photographed with a scale, north arrow, and unit/feature designation. The following information should be recorded: the type of elements represented in the remains; the location (horizontal and vertical) of the remains inside the turret and within the stratigraphic profile of the surrounding sediment matrix; the position of the head, arms, and legs in relation to the rest of the body represented; and the orientation of the remains in terms of cardinal directions, internal hull and turret construction features, and other reference points.

Additional information, such as the presence of pathological conditions, associated perishables (e.g., clothing, hair, blood, gastrointestinal contents) and non-perishable (e.g., ornaments, tools, personal effects) materials, and anatomical observations (missing, displaced, or truncated elements) should also be documented.¹⁷⁶

Once information at the burial site has been sufficiently documented, the human remains should:

be recovered to safeguard them from further disturbance Each element should then be lifted separately. Gradual pressure spread out over the greatest preserved area will help reduce the risk of snapping or otherwise damaging remains. Adhering sediments

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

should be cleaned off right in place, collected with the dredge, and screened.¹⁷⁷

The procedures give additional and very specific guidance as to how to recover certain fragile bones, how to preserve any surviving soft tissue, and what to do with severely decayed remains. The procedures recommend that, once recovered, the remains should be handled in minimal amounts, and that “[a]ll remains should be kept submerged in water, refrigerated, and in a dark environment subsequent to their recovery from the site,” and that “[p]ersonal effects should also be kept submerged in water, but in a separate container than the human remains.”¹⁷⁸ Those who must handle the remains should wear “[l]atex gloves and plastic aprons, along with surgical head coverings and facemasks . . . in order to prevent handlers from contaminating the specimens.”¹⁷⁹

The recovered human remains should be “examined and recorded on the barge immediately after recovery. As soon as possible the remains will be packaged and transported to the Mariner’s Museum, Newport News, Virginia, where the Museum’s Chief Conservator will provide secure storage for the material until more detailed examination and analysis can be conducted.”¹⁸⁰ The remains should be “packaged wet in hard plastic, sealing containers. Ideally, they will remain fully submerged throughout the transport.” “Transport will either be conducted aboard a commercial airline, or military aircraft.”¹⁸¹

In addition to this basic recovery framework, the procedures also set out an extensive list of possible tools and other materials that may be needed during the recovery, as well as guidance on how to proceed in the event that emergency field conservation methods are required.¹⁸²

While the recovery of human remains from the USS *Monitor* is but a single example of recovery procedures, it acts as empirical proof that (1) such procedures are a necessary part of the exploration of underwater cultural heritage, and that (2) recovery of human remains from UCH can be successfully accomplished according to scientific

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

methods and operations. Such examples as the USS *Monitor* act as guidance for the development of a more specific legal policy concerning how to proceed in the interaction with and potential recovery of human remains from UCH sites.

VI CONCLUSION

Since the formation of the 1982 Law of the Sea Convention, it has become widely accepted that underwater cultural heritage should be protected and preserved for the benefit of mankind generally. However, only within the last decade has it been recognized that the concept of protection and preservation does not necessarily apply to all underwater cultural heritage evenly. Instead, international agreements have started to recognize the need to provide additional or special protections to those human remains found at UCH sites.

As can be seen from the examples discussed in this paper, at least four methods have emerged to govern the treatment of human remains in a way distinct from other UCH. First, such agreements as those governing the wrecks of the M/S *Estonia* and HMS *Birkenhead* establish a policy of absolute non-disturbance, where human remains are not to be disturbed under any circumstances.

Secondly, a number of agreements, most notably the 2001 UNESCO Convention, incorporate the *in situ* preservation policy where preserving the artifacts on the site of discovery is to be considered the first option and disturbance is not preferred unless determined to be justified by certain circumstances, including threat of harm or destruction by looting, unwanted salvage, or some incidental and perhaps unintentional harm from activities related to exploitation of natural resources such as dredging, trawling and oil/gas development.

Third, agreements such as that governing the HMS *Spartan* operate a scheme where human remains are to be recovered and returned to their state of origin. Lastly, as seen in the La Belle Agreement, some agreements establish a joint commission, advisory board, or decision-making body that has the ultimate task of deciding what to do with any human remains encountered at the wreck site. In the case of the *La Belle*, the joint commission opted for the recovery of the remains of a single sailor found on the wreck. The sailor was then buried in Texas, following a large-scale funeral service attended by such public figureheads as the Governor of Texas and the French Ambassador to the United States.

Although these examples provide empirical models from which improvements in the regulatory scheme can be accessed and expanded upon, they do not necessarily highlight a single, customary method of regulating the interaction with and potential recovery of human remains at UCH sites. Instead, drafters of future international agreements and conventions involving the regulation of human remains must take care, on a case-by-case basis, that future accords sufficiently respect and honor the deceased, while also providing a mechanism for society to preserve important historical, cultural, and scientific opportunities offered by the remains. Additionally, drafters must reckon with and decide whether to incorporate the Law of the Sea's distinction between sovereign vessels and merchant vessels into the regulation of the recovery of human remains from sovereign vessels. Drafters may also want to consider other factors, including whether any known personal or religious beliefs of the deceased should be incorporated into interaction and recovery plans, the extent to which surviving family members should be able to dictate the treatment of the remains, and whether a distinction should be made between those remains discovered at UCH sites, and those remains intentionally left at UCH sites.¹⁸³

¹⁸³ See, e.g., MD. CODE ANN. CRIM. LAW § 10-401(d) (West 2012) (providing protection to any "human remains and associated funerary objects that result from a shipwreck or accident and *are left intentionally to remain at the site*" (emphasis added)).